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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

VS.

ROBERT O. McDONNELL, individually and on behalf of All prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

WILLIAM J. SCOTT,
Attorney General,
State of Illinois.

JAMES B. ZAGEL,
Assistant Attorney General of the
State of Illinois,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,

Counsel for Amicus Curiae.

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This brief is filed with this Court pursuant to the authority found in paragraph 4 of Rule 42 of the Supreme Court Rules.

INTEREST OF THE AMICUS CURIAE

The State of Illinois manages a large penitentiary system. Since the decision in this case may affect prison systems throughout the nation, the State of Illinois has an important interest in advancing argument on behalf of its right to prescribe prison mail practices.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE THAT MAIL FROM LAWYERS TO INMATES BE OPENED AND INSPECTED IN THE PRESENCE OF THE INMATE.

Illinois agrees generally with the arguments advanced by petitioners on the issues before the Court. Specifically, Illinois agrees with the position stated by Nebraska and California with respect to the necessity of opening and inspecting incoming mail which appears to be legal in nature. We part company on the question of the inmate's Constitutional right to be present when this inspection occurs.

The procedure used in Illinois is similar to the procedure which Nebraska would use. For the last two months, as a matter of administrative grace, the Illinois Department of Corrections has been operating with a system in which the inmate is present at the opening of legal mail. The Department does not consider itself constitutionally bound to continue this practice if it proves unworkable. We assume that the inmate's presence is designed as a kind of insurance that the prison mail office goes no further than inspection.

Initially, we do not concede that the *reading* of attorney-inmate mail would be unconstitutional. There is no precedent for holding that the attorney-client privilege is mandated by the United States Constitution. See *Felber* v. *Foote*, 321 F. Supp. 85, 87-88 (D. Conn. 1970) (3 judge court).

It is difficult in light of *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) to argue that the attorney-client privilege

may be implied from some provision of the Constitution. Even if the privilege is implicit in the Constitutional right to assistance of counsel, it would apply only to criminal cases and there would be no prohibition against the reading of mail from attorneys pertaining to civil cases. See *Evans* v. *Moseley,* 455 F. 2d 1084, 1087 (10th Cir. 1972).[1]

Further, the attorney-client privilege applies solely to communications by the client. There is no privilege for communications by the attorney. And the policy underlying the privilege is recognized as weak. See 8 Wigmore, Evidence, pp. 557-58 (3rd Ed. 1940) (p. 554, McNaughton Rev. 1961) McCormick, Evidence, p. 182 (1954). ("it would be hard to maintain that a privilege . . . would facilitate more than it would obstruct the administration of justice"). See *Branzburg* v *Hayes,* 408 U.S. 665, 690 n. 29 (1972).

There is obviously no explicit basis for a constitutional requirement of the inmate's presence at mail inspection. As an administrative technique it raises more problems than it solves.

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1. Some would claim that the civil right of access to courts implies an attorney-client privilege. The problems with this argument are many. It requires two implied rights, i.e. the implied right to an attorney as part of the civil right of access to courts and from that implied right, an implied right to a privilege. The first implied right flies in the face of refusal to extend the constitutional right of counsel to civil cases. Moreover, the right of access to courts is in fact not dependent upon the right to an attorney. See e.g., Haines v. Kerner, 404 U.S. 19 (1972). Finally, even if an attorney is required it does not follow that an attorney-client privilege is a necessary or desirable part of the attorney-client relationship, particularly in civil cases.

First, there will be delays in legal mail delivery since the inmate's presence must be secured in order for his legal mail to be processed. Second, the increase in risk to security may be significant. Third, there is the additional risk that when contraband is discovered in the inmate's presence, he will attempt to seize the contraband. He may become violent if the contraband is confiscated in his presence.

Fourth, as a monitor of prison administrative practice, an inmate is not likely to be effective. A malicious inmate (and convicted felons as a group have a high percentage of malicious persons) will claim anything if he feels he might gain some advantage or if his false claim serves to harass prison officials. An inmate is not an impartial arbiter. And, of course, a malicious prison official may well decide that he does not have much to lose from a swearing contest with an inmate.

In sum, the presence of an inmate at mail inspection will do nothing to insure the end to which it is directed. It will cause delay of mail, increased security problems and generate a large number of swearing contests to occupy the time of federal judges.

Admittedly, an inmate does have a right to communicate with courts handling his litigation and with attorneys working to overturn his conviction without physical obstruction of that communication. Blatant censorship of legal letters without any relationship to the demands of security is a practice not to be countenanced. However, a prison mail regulation which allows unobstructed correspondence on litigation matters between inmates and their appropriate attorneys or the courts, subject only to opening, verification and inspection of the mails by the

prison mail officer alone, is more than sufficient to meet constitutional standards. Both the Illinois and Nebraska correctional systems have legal mail regulations which are adequate to satisfy an inmate's constitutional rights. Therefore, legal grounds do not exist for mounting an effective challenge to these mail regulations in a 42 U.S.C. 1983 action.

CONCLUSION

For the foregoing reasons, the State of Illinois respectfully requests that the Judgment below be reversed.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General,
State of Illinois.

JAMES B. ZAGEL,
Assistant Attorney General of the
State of Illinois,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,

Counsel for Amicus Curiae.